

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

UNITED STATES OF AMERICA

v.

HEATHER CLARK,

Defendant.

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Case No. 2:02CR10104

OPINION AND ORDER

By: James P. Jones

United States District Judge

*Jennifer R. Bockhorst, Assistant United States Attorney, Abingdon, Virginia,
for United States of America; Michael A. Bragg, Bragg & Associates, P.C.,
Abingdon, Virginia, for Defendant.*

The defendant, Heather Clark, pleaded guilty on January 2, 2003, to Count Two of the Indictment in this case, charging her with possessing with intent to distribute and distributing oxycodone, a schedule II narcotic controlled substance, in violation of 21 U.S.C.A. § 841(a)(1) (West 1999). The maximum penalty for this offense is imprisonment for twenty years. 21 U.S.C.A. § 841(b)(1)(C) (West 1999). Following her guilty plea, I ordered the defendant detained in custody pending sentencing, which is scheduled for March 21, 2003. The defendant asked to be allowed to remain on bond at the time of her guilty plea and has now filed a written Motion for Release on Conditions Pending Sentencing.

The Bail Reform Act provides that a person who has committed an offense for which there is a maximum term of imprisonment of ten years or more under the Controlled Substances Act shall be detained pending sentencing, unless the attorney for the government has recommended that no sentence of imprisonment be imposed and the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or the community. *See* 18 U.S.C.A. § 3143(a)(2) (West 2000).¹ In addition, § 3145(c) of the Act provides that such a person may be released under appropriate conditions “if it is clearly shown that there are exceptional reasons why such person’s detention would not be appropriate.” 18 U.S.C.A. § 3145(c) (West 2000).

It has been held that § 3145(c) applies only to appeals of detention orders and not to initial detention decisions in the district courts, as occurred here. *See United States v. Nesser*, 937 F. Supp. 507, 509 (W.D. Pa. 1996). However, the weight of authority is that § 3145(c) does apply to the district courts, in spite of the fact that the section itself is largely concerned with the review and appeal of detention orders and

¹ The Mandatory Detention for Offenders Convicted of Serious Crimes Act, Pub. L. No. 101-647, § 902, 104 Stat. 4826, 4826-27 (1990), amended the Bail Reform Act in this regard.

indeed, is so entitled.² *See United States v. Burnett*, 76 F. Supp. 2d 846, 847-49 (E.D. Tenn. 1999) (reviewing cases).

Assuming that I thus have the power to release the defendant if the necessary conditions are met, I must examine the circumstances presented, both at the change of plea hearing and in the defendant's present motion, to determine whether the defendant is eligible for release.

It does appear that the defendant is not likely to flee or pose a danger to any other person. She abided by all of the conditions of her prior release and there is no indication that she would not continue to do so. She has a job and family in this district and does not appear to be a present user of illegal drugs. However, while the attorney for the government does not object to the defendant's continuation on bond, she expressly disclaims any recommendation that no sentence of imprisonment be imposed. Accordingly, the issue is whether there are "exceptional reasons" within the meaning of § 3145(c) for the defendant's release.

The defendant contends the exceptional reasons are that (1) the government does not object to her release; (2) she has abided by her prior conditions of release; (3) she has a job and is responsible for the support of her three-year-old child; (4) her

² Section 3145 is entitled "Review and appeal of a release or detention order" and subsection (c) is entitled "Appeal from a release or detention order."

sentencing is eighty days in the future; and (5) the defendant disputes the drug weight claimed by the government.

While the statute does not define “exceptional reasons,” it has been held to mean “a ‘unique combination of circumstances giving rise to situations that are out of the ordinary.’ ” *Burnett*, 76 F. Supp. 2d at 849 (quoting *United States v. DiSomma*, 951 F.2d 494, 497 (2d Cir. 1991)).

After careful consideration, I find that the defendant’s circumstances are not exceptional. Although the government attorney did not oppose the defendant’s release, I cannot leave this decision solely in the hands of the prosecutor, particularly since the government is not in a position to recommend that the defendant serve no time in prison. It is certainly usual practice for defendants in this court to abide by their conditions of release. The defendant’s family and job responsibilities are unfortunately common, rather than unique, circumstances of convicted drug traffickers.³

³ Further, as noted by the court in *Burnett*:

[I]f it [was] determined [that] such personal hardships qualified to prevent or delay detention, then inevitably defendants committing the same offenses would be treated disparately for reasons unrelated to their crimes or personal character. A drug trafficker with no family would immediately go to jail while a drug trafficker convicted of the same offense with a family would remain on bail. Such disparity . . . would be contrary to the goals of the federal criminal legal system and would not be a desirable objective of a just system of law.

A defendant's sentencing is routinely set off in the future in order to enable a presentence investigation report to be prepared. While the defendant plans to dispute the government's evidence as to the drug weight attributable to her, I cannot say at this point that the drug weight as ultimately determined will produce an offense level that will qualify the defendant for an alternative to incarceration under the sentencing guidelines.⁴

In summary, none of the suggested reasons, either alone or in combination, are exceptional and thus I find the defendant ineligible for release pending sentence.

It is accordingly **ORDERED** that the defendant's Motion for Release on Conditions Pending Sentence [Doc. No. 30] is denied.

ENTER: January 7, 2003

United States District Judge

76 F. Supp. 2d at 850.

⁴ In the Plea Agreement, the government promises not to object to the imposition of alternatives to incarceration "[i]f applicable under the sentencing guidelines." (Plea Agreement ¶ 6.)